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Karen Colby Weiner

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# CHILD SUPPORT: THE DOUBLE STANDARD

KAREN COLBY WEINER\*

Historically and presently, the purpose of imposing a legal duty of child support upon a parent has been to ensure that children are provided for<sup>1</sup> through private rather than public resources.<sup>2</sup> While this end is justified, it is often not achieved.<sup>3</sup> Furthermore, considering the rapidly changing role of women in our society, the gender-based double standard frequently employed by courts and legislatures enforcing this duty is questionable. This article examines the child support obligation as presently enforced through statutes and case law. Emphasis is placed on ways of accomplishing such enforcement based on the individual capacity of each parent to pay rather than on sexual stereotypes.

## I. OVERVIEW

At early common law, the obligation to support one's children was considered merely moral and insufficient to bind either parent legally.<sup>4</sup> As the moral obligation evolved into a legal duty, the great

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\* J.D. 1977, University of Detroit School of Law, Member, Michigan Bar; law clerk to G. Mennen Williams, Associate Justice, Michigan Supreme Court; Teaching Fellow, Detroit College of Law.

1. A breach of the parental obligation, for whatever cause, justifies intervention by the state as *parens patriae* to protect its interest in the physical and mental well-being of its future citizens. See, e.g., *State ex rel. Stearns County v. Beard*, 59 Miss. 161 (1881); cf. *Blackley v. Blackley*, 204 S.E.2d 678 (N.C. 1974) (holding that in a custody proceeding the welfare of the child is the paramount consideration and that the trial judge should strive "to place the child in an environment which will best promote the full development of his [or her] physical, mental, moral, and spiritual faculties." *Id.* at 681).

2. *State v. Thornton*, 134 S.W. 519 (Mo. 1911); *Willits v. Willits*, 107 N.W. 379 (Neb. 1906); *Coler v. Corn Exch. Bank*, 164 N.E. 882 (N.Y. 1928), *aff'd*, 280 U.S. 218 (1930). See also N.Y. FAM. CT. ACT § 415 (McKinney 1975), which imposes the support obligation even on stepparents of a child who is likely to become a recipient of public welfare.

3. A recent study by the General Accounting Office on fathers of children on welfare who had agreed to make child support payments, either voluntarily or under court order, reveals that of fathers with annual incomes between \$6,000 and \$12,000, 66% were not in compliance. Likewise, of those with annual incomes of more than \$12,000, 70% were not in compliance. N.Y. Times, Dec. 8, 1974, § 1, at 31, col. 1. See also note 205 *infra*; B. BROWN, A. FREEDMAN, H. KATZ, & A. PRICE, *WOMEN'S RIGHTS AND THE LAW* 146 (1977) [hereinafter cited as *WOMEN'S RIGHTS*].

4. *Porter v. Powell*, 44 N.W. 295 (Iowa 1890); *Kelley v. Davis*, 49 N.H. 187 (1870); *Gordon v. Potter*, 17 Vt. 348 (1845); *Mortimore v. Wright*, 6 M. & W. 482, 487 (Ex. 1840); see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.1, at 488 (1968) (regarding a conflict in the early American cases).

The obligation was first established as a legal duty in 1601 by the passage of the statute of 43 Eliz., c. 2, art. VII, under which the parents and grandparents of a child were obligated to provide for maintenance upon the order of two magistrates, on pain of criminal penalties and seizure of personal property. See 1 W. BLACKSTONE, *COMMENTARIES* 447-48 (J. Wendell ed. 1847).

majority of courts placed it solely upon the father.<sup>5</sup> Justifications for this disparate treatment included the common law disability of women,<sup>6</sup> the weaker nature and minimal earning ability of women,<sup>7</sup> the natural differences between the sexes,<sup>8</sup> and the fact that the mother was not entitled to the services of her children.<sup>9</sup>

Support of dependent children is now a legally enforceable duty, by statute or common law, in every jurisdiction.<sup>10</sup> However, the manner of enforcement varies. Generally, this duty is imposed in three distinct ways: (1) placement of an absolute duty of support on the father, (2) placement of a primary duty of support on the father accompanied by a secondary duty on the mother, or (3) placement of a presumptively equal duty on both parents.

### A. Absolute Duty of Support on the Father

Under the "traditional view,"<sup>11</sup> "support of a child is exclusively a father's obligation, and . . . the wife's separate income, assets, and ability to provide for the children are irrelevant to the father's obligation to support the children."<sup>12</sup> The inequity of this manner of imposing the support duty is illustrated by *Bill v. Bill*,<sup>13</sup> an Indiana case in which the court, relying on a state statute, adhered to the rule of absolute liability of the father.<sup>14</sup> In that case, a father ap-

5. *Gilley v. Gilley*, 9 A. 623 (Me. 1887); H. CLARK, *supra* note 4, at § 15.1, at 488. *Contra*, *Finch v. Finch*, 22 Conn. 411 (1853); *Purity Baking Co. v. Industrial Comm'n*, 166 N.E. 33 (Ill. 1929); *Alvey v. Hartwig*, 67 A. 132 (Md. 1907); *Hunter v. State*, 134 P. 1134 (Okla. Crim. App. 1913).

6. See *Gully v. Gully*, 231 S.W. 97 (Tex. 1921); *Magee v. White*, 23 Tex. 180 (1859).

7. W. BLACKSTONE, *supra* note 4, at 441, states: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ."

8. See *Alling v. Alling*, 27 A. 655, 658 (N.J. Ch. 1893).

9. See *Gully v. Gully*, 231 S.W. 97 (Tex. 1921).

10. *Gilley v. Gilley*, 9 A. 623 (Me. 1887). At common law, in return for the duty of support, a father was entitled to the services of his children during their minority. This meant that he was entitled to their labor in his home or business or was entitled to their wages if they were employed elsewhere. See *Cragford Bank v. Cummings*, 113 So. 243 (Ala. 1927).

See 27 ARK. L. REV. 157, 158 (1973).

11. H. CLARK, *supra* note 4, at § 15.1, at 488.

12. *Bill v. Bill*, 290 N.E.2d 749, 755 (Ind. Ct. App. 1972). Although there is presently little practical distinction between a father's "absolute" and "primary" liability for support, see text accompanying note 34 *infra*, there was an historical distinction, see 27 ARK. L. REV. 157 (1973), which was perpetuated in *Bill*. This article, therefore, treats the areas separately.

13. *Bill v. Bill*, 290 N.E.2d 749, 755 (Ind. Ct. App. 1972).

14. 290 N.E.2d 749 (Ind. Ct. App. 1972).

14. Taken literally, the statute did not place absolute support liability on the father:

The court in decreeing a divorce shall make provision for the guardianship, custody, support, and education of the minor children of such marriage; and the court may require the father to provide all or some specified part of the cost of education of such child or children beyond the twelfth year of education provided by the

pealed from an order to pay \$240 per week in child support. He contended that the amount of the order was so excessive as to constitute an abuse of discretion. At the time of the divorce the father's net worth was \$106,639. The mother, as beneficiary of a trust fund, had a net worth of \$450,000. Prior to the divorce, both parents had made substantial financial contributions to the marriage.<sup>15</sup> Although the court expressed reluctance about its decision,<sup>16</sup> it stated that even "[t]emporary forced indebtedness of the father and affluence of the mother . . . do not mitigate a father's firmly established duty to support his progeny."<sup>17</sup>

The court, therefore, disregarded both the mother's present ability to make a monetary contribution to the support of her children and the parents' prior practice of joint financial maintenance of their home and family. Furthermore, this was not a situation in which the court charged a nominal amount of support to a noncustodial father on the assumption that the mother, because of necessity, would be forced to contribute her own assets.<sup>18</sup> The minimum

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public schools, taking into consideration the earnings of the father, the station in life of the parents and child or children involved, the aptitude of the child or children as evidenced by school records, the separate property of the child or children, and all other relevant factors: Provided, that the jurisdiction over the child or children shall remain in the court at all times during the child's or children's minority and shall not be lost because of the death of either parent.

Ch. 57, § 1, 1965 Ind. Acts 88 (current version at IND. CODE ANN. § 31-1-11.5-12 (Burns Supp. 1977)) (emphasis added). The court, however, viewed precedent as interpreting the statute to mean that support was exclusively a father's obligation. 290 N.E.2d at 756. Despite this, the court said that the statute was sufficiently flexible to allow a trial court, in the proper circumstances, to order contribution from the mother even though the father possessed adequate financial means. For an appellate court to reverse, however, the court determined that an abuse of the trial court's discretion must be found. Considering the rule in this jurisdiction, the court could find no abuse of discretion, despite the exigencies of the case.

Although *Bill* involved a pendente lite support order, the statute and its prior interpretation are not limited to such orders. It is reasonable to assume, therefore, that a permanent support order would follow the same rule of absolute liability.

15. In fact, during the early years of marriage the wife contributed most of the couple's income. After a number of years each was making a 50% contribution. 290 N.E.2d at 751.

16. The court admitted that the result was "harsh" and suggested that, as an alternative remedy, the father seek modification of the support order in the lower court. *Id.* at 758. Courts, however, are generally reluctant to modify support orders in the absence of a substantial change of circumstances, which was not present in this case. See *Doran v. Doran*, 287 N.E.2d 731, 733 (Ill. App. Ct. 1972).

17. 290 N.E.2d at 758.

18. The statutory and common law requirements placing an absolute duty of support (or primary duty, as discussed later in this article) on the father often differ substantially from the realities of child support. The custodial parent, usually the mother, often bears the greater burden to the extent that he or she must absorb the routine, day-to-day expenses which appear inconsequential and unworthy of inclusion in the calculus used to determine the amount of the noncustodial parent's contribution. Such expenses can, however, have a substantial cumulative impact. Also, support orders to the noncustodial parent are frequently not compiled with, see note 3 *supra* and accompanying text; note 205 *infra*, and, except in

total monthly amount payable by the father was \$3,536. This included the mortgage payments on the home in which the mother and four children resided, property taxes, insurance, and other related expenses. In addition, he was required to pay medical, dental, and educational expenses as they arose.<sup>19</sup>

The same result, in certain cases, could be reached in jurisdictions which place a presumptively equal duty of child support on both parents.<sup>20</sup> The inequity of a rule placing an absolute duty on the father, however, lies in its inflexibility. In *Bill*, the mother clearly was able to assist in providing for the monetary needs of the children, yet the appellate court was not free to reverse.<sup>21</sup> Tradition and precedent compelled the court to perpetuate a double standard which was manifestly inappropriate in the case to which it was applied.<sup>22</sup>

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cases of parents of substantial means, support awards are often not large enough to cover all the children's needs. Further, the greater time and care given by the custodial parent, though not normally assessed in monetary terms, are substantial contributions to the children's support.

Rather than recognizing these "monetary contributions by necessity" and the equally important nonmonetary contributions, many courts and legislatures have perpetuated a system of financial inequality. It is not unlikely that this inequality is responsible to some extent for the statistically ineffectual enforcement of support orders. In *Houston v. Snyder*, 440 S.W.2d 156 (Mo. Ct. App. 1969), the court cautioned that a child support order "should not be so great as to destroy the father's incentive . . ." *Id.* at 161. There may be a nexus between a father's feelings of discriminatory treatment under the law and his unwillingness to comply with a court-ordered support obligation. Legislative and judicial recognition of support as a shared responsibility and the actual contribution of each parent could result in a greater incidence of compliance.

19. 290 N.E.2d at 752-53.

20. See note 204 *infra*. The circumstances under which the father should or should not bear the total responsibility for child support were described in 1963 by the President's Commission on the Status of Women:

Where the family decides it is necessary or desirable for the wife to work outside the home, it is reasonable that her income, as well as the husband's, be used to help support the children . . . . On the other hand, where the family decides that it is necessary or desirable for the wife to work only in the home and the wife has no independent income, the husband must necessarily bear the full responsibility for family support.

THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS 22 (1963).

21. See note 14 *supra*.

22. The court's call to the Indiana Legislature to "[bestir] itself to modernize our divorce laws," 290 N.E.2d at 758, was apparently heeded. The statutory provision under which *Bill* was decided was repealed by P.L. 297, § 3, 1973 Ind. Acts 1585. The current provision, IND. CODE ANN. § 31-1-11.5-12 (Burns Supp. 1977), provides that "the court may order either parent or both parents to pay any amount reasonable for support of a child . . ." (Emphasis added.) Included among the factors the court is directed to consider are "the financial resources of the custodial parent" and the "financial resources and needs of the noncustodial parent."

### B. Primary Duty of Support on the Father

Most jurisdictions have retreated from absolute liability to a rule under which the father is primarily liable for support payments,<sup>23</sup> and the mother is secondarily liable.<sup>24</sup> Although there is some disagreement as to when the mother's secondary obligation arises,<sup>25</sup> generally the father, as primary obligor, is initially the sole party upon whom the legal duty of support rests. Should he be unable to fulfill this obligation, a legal duty would be enforceable against the mother as secondary obligor.

In *O'Brien v. O'Brien*,<sup>26</sup> a Missouri court considered a father's contention that the trial court had abused its discretion in ordering him to pay child support when there was evidence that his ex-wife had adequate means to support herself and the children. The mother had been granted custody of one of the three minor children and shared custody of another with the father. The third child was in the full custody of the father. Both parents were gainfully employed.<sup>27</sup>

The court affirmed an award to the mother of \$250 per month in child support. The individual circumstances did not outweigh the "well established" rule in that jurisdiction<sup>28</sup> that "it is the primary duty of the father to support and educate his children notwithstanding the fact that the mother may have independent means."<sup>29</sup>

23. 27 ARK. L. REV. 157, 158 (1973); see H. CLARK, *supra* note 4, at § 15.1, at 488. As of 1968, 44 states and the District of Columbia followed a rule placing a primary duty of support on the father and a secondary duty on the mother. United Nations Commission on the Status of Women, Parental Rights and Duties, Including Guardianship, U.N. Doc. 6/474/Rev. 1, at 51 (1968). This number has since been reduced somewhat by statutory amendments. See note 48 and accompanying text *infra*.

24. *E.g.*, *McQuade v. McQuade*, 358 P.2d 470 (Colo. 1960); *Duncan v. Duncan*, 146 So. 2d 255 (La. Ct. App. 1962); *Boerger v. American Gen. Ins. Co.*, 100 N.W.2d 133 (Minn. 1959); *O'Brien v. O'Brien*, 485 S.W.2d 674 (Mo. Ct. App. 1972); *Williams v. Williams*, 134 S.E.2d 227 (N.C. 1964); *O'Leary v. Porter*, 167 N.W.2d 193 (Wis. 1969). See also H. CLARK, *supra* note 4, at § 15.1, at 488. For a typical statute placing a primary duty of support on the father and a secondary duty on the mother, see N.Y. FAM. CT. ACT §§ 413-414 (McKinney 1975).

25. See 27 ARK. L. REV. 157, 158 (1973).

26. 485 S.W.2d 674 (Mo. Ct. App. 1972).

27. The father's take-home pay was \$580 per month, while the mother's was \$349.46 per month. Additionally, the father's savings account totaled \$15,000, while the mother had savings of \$17,000. The father also owned stock, the vast majority of which represented his interest in the family restaurant. *Id.* at 675-76.

28. The Missouri support statute charges both parents with the duty of support. MO. ANN. STAT. § 559.353 (Vernon Supp. 1978). The imposition of a primary duty of support on the father, therefore, was apparently based on tradition and judicial precedent. See *Riggin v. Riggin*, 373 S.W.2d 633 (Mo. Ct. App. 1963); *Mathews v. Mathews*, 337 S.W.2d 529 (Mo. Ct. App. 1960).

29. 485 S.W.2d at 677. The decision was reversed as to the award of attorney's fees to the mother. The court held that "allowances for counsel fees in proceedings of this nature are to be determined by reference to the financial circumstances of both parties with the determina-

The primary duty is more than a presumption in favor of a father's duty of support. It normally amounts to an irrebuttable<sup>30</sup> legal duty which is abrogated only by circumstances rendering the father's fulfillment impossible or nearly so.<sup>31</sup> The mother's assets or income-producing capacities are often disregarded in determining the amount to be paid by the father.<sup>32</sup> "[T]he measure of the father's obligation is the child's needs in relation to the father's station in life, his pecuniary resources, and his earning ability honestly exercised."<sup>33</sup> The result of the rule imposing a primary duty of support on the father, therefore, is substantially the same as that of the rule imposing an absolute liability.<sup>34</sup> Death appears to be the most certain relief from primary liability,<sup>35</sup> but even this has been questioned.<sup>36</sup>

The imposition of either absolute or primary liability for child

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tive inquiry being whether the wife is possessed of sufficient means on her own to prosecute the suit." *Id.* at 678.

30. *McQuade v. McQuade*, 358 P.2d 470 (Colo. 1960); *Dworkis v. Dworkis*, 111 So. 2d 70 (Fla. 3d Dist. Ct. App.), *cert. denied*, 115 So. 2d 6 (Fla. 1959); *Gay v. Gay*, 421 S.W.2d 603 (Ky. 1967); *Brosam v. Brosam*, 437 S.W.2d 694 (Mo. Ct. App. 1969); *Trautman v. Trautman*, 166 N.W.2d 415 (Neb. 1969); *Williams v. Williams*, 134 S.E.2d 227 (N.C. 1964).

31. The father may be relieved of his primary obligation because of illness, *Cassas v. Cassas*, 276 P.2d 456 (Wyo. 1954); inability to "muster" sufficient funds, *Farah v. Farah*, 102 N.Y.S.2d 147 (Dom. Rel. Ct. 1951); or death, *DeSena v. Prudential Ins. Co. of America*, 284 A.2d 363 (N.J. Super. Ct. App. Div. 1971). *See also* *Copeland v. Copeland*, 65 So. 2d 853 (Fla. 1953); *Lewis v. Lewis*, 151 N.Y.S.2d 894 (Sup. Ct. 1956), *appeal dismissed*, 174 N.Y.S.2d 241 (1958).

32. *See* cases cited note 30 *supra*.

33. *Williams v. Williams*, 134 S.E.2d 227, 233 (N.C. 1964).

34. Appellate courts have found the primary duty to be so basic as to enforce it irrespective of whether the trial court's divorce decree orders the father to pay child support, *Ciociola v. Ciociola*, 302 So. 2d 462 (Fla. 3d Dist. Ct. App. 1974); *cf.* *Voss v. Voss*, 415 P.2d 303 (Idaho 1966) (upholding trial court's order requiring father to pay \$900 for past support of his child for a period when there was no outstanding court order requiring him to make support payments), and have called the duty nondelegable, *Warrick v. Hender*, 198 So. 2d 348 (Fla. 4th Dist. Ct. App. 1967); *In re Adoption of P.J.K.*, 359 S.W.2d 360 (Mo. Ct. App. 1962). The duty is not limited by the father's present earnings. The court may also consider his *ability* to earn money and make an award based thereon. *See* *Voss v. Voss*, 415 P.2d 303.

35. *Flagler v. Flagler*, 94 So. 2d 592 (Fla. 1957); *DeSena v. Prudential Ins. Co. of America*, 284 A.2d 363 (N.J. Super. Ct. App. Div. 1971).

36. The father is sometimes ordered, in partial fulfillment of his support obligation, to carry life insurance on himself with his children as the designated beneficiaries. *See, e.g., Franklin Life Ins. Co. v. Kitchens*, 249 Cal. App. 2d 623 (2d Dist. Ct. App. 1967); *Guggenheimer v. Guggenheimer*, 112 A.2d 61 (N.H. 1955), *discussed in* 35 B.U. L. REV. 596 (1955); *Grotzky v. Grotzky*, 277 A.2d 535 (N.J. 1971). *But see* *Budig v. Budig*, 481 S.W.2d 95 (Ky. 1972). *See generally* Foster, Freed, & Midonick, *Child Support: The Quick and the Dead*, 26 SYRACUSE L. REV. 1157 (1975).

This type of order is not necessarily limited to jurisdictions which place a primary duty of support on the father. Colorado statutorily holds each parent liable for child support, COLO. REV. STAT. § 14-10-115 (1973), and a recent decision ordered both parents to carry life insurance with the children as beneficiaries. *In re Marriage of Icke*, 530 P.2d 1001 (Colo. Ct. App. 1974), *aff'd*, 540 P.2d 1076 (Colo. 1975).

support on the father perpetuates a double standard which, although perhaps warranted at one time, appears unjustified today.<sup>37</sup> The financial responsibilities of families are increasingly borne jointly by men and women. In 1974, 54.2% of all women between the ages of eighteen and sixty-four were in the labor force.<sup>38</sup> Of mothers who were widowed, divorced, or separated, 67.3% were employed.<sup>39</sup> Additionally, 51.2% of mothers whose husbands were present in the household were working.<sup>40</sup> These statistics evidence a sharp increase over the past several years in the number of working married women.<sup>41</sup> Although women's average earnings remain less than those of men,<sup>42</sup> and the rate of unemployment for women is higher

37. This double standard is not limited to the area of child support. Then United States Representative Martha Griffiths, in discussing federal income security programs, stated:

The income security programs of this nation were designed for . . . a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is further than ever from the truth.

Griffiths, *Sex Discrimination in Income Security Programs*, 49 NOTRE DAME LAW. 534, 534 (1974).

38. *Taylor v. Louisiana*, 419 U.S. 522, 535 n.17 (1975) (citing U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE (Oct. 1974)).

39. *Id.* (citing U.S. DEP'T OF LABOR, MARITAL AND FAMILY CHARACTERISTICS OF THE LABOR FORCE, Table F (March 1974)).

40. *Id.* Furthermore, most mothers work for financial reasons, and, in homes in which both parents were present, working wives accounted for 26% of family income. COUNCIL OF NATIONAL ORGANIZATIONS FOR CHILDREN AND YOUTH, AMERICA'S CHILDREN: A BICENTENNIAL ASSESSMENT 57 (1976).

41. In 1940, 14% of married women were employed. In 1970, this figure had risen to 40%. U.S. SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION & WELFARE, RESEARCH AND STATISTICS NOTE No. 10-1974, WIFE'S EARNINGS AS A SOURCE OF FAMILY INCOME 1 (1974).

42.

MAJOR OCCUPATION GROUP	[WOMEN'S] INCOME	AS PERCENT OF MEN'S INCOME
Professional and Technical workers	8,346	69
Nonfarm managers and administrators	7,312	56
Clerical workers	5,718	62
Sales workers	4,549	43
Operatives, including transport	4,798	61
Service workers (except private household)	4,280	60

U.S. EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (rev. ed. 1973).



than that for men,<sup>43</sup> these conditions are being equalized.<sup>44</sup> The present situation certainly warrants replacement of the double standard in child support with a case-by-case analysis of individual circumstances and an equitable apportionment of the support obligation.<sup>45</sup>

### C. Presumptively Equal Support Obligation on Both Parents

The most recent trend in the area of child support is to allocate the responsibility between both parents, that is, to place a presumptively equal support responsibility on each.<sup>46</sup> The idea of an equal

43.

RACE AND AGE	AVERAGE PERCENT UNEMPLOYED IN 1972	
	WOMEN	MEN
All races	6.6	4.9
16 to 19 years	16.7	15.9
20 years and over	5.4	4.0
Minority races	11.3	8.9
16 to 19 years	38.6	29.8
20 years and over	8.8	6.8

*Id.*

44. 42 U.S.C. § 2000e-2(a) (Supp. V 1975) provides: "It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . ."

Recent decisions demonstrate that female-protective statutes and practices concerning employment cannot be preserved under this act. *See, e.g.,* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (Marshall, J., concurring); Jones Metal Prods. Co. v. Walker, 281 N.E.2d 1 (Ohio 1972); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. Rev. 617, 619 (1974). *See also* 15 U.S.C. § 1691 (Supp. V 1975); 29 U.S.C. § 206(d) (1970).

45. Despite the normal irrebuttability of the father's primary duty of support, one court allowed an exception in the case of a contractual obligation assumed by a mother. In *Barnhard v. Barnhard*, 477 S.W.2d 845 (Ark. 1972), a noncustodial mother appealed to the Supreme Court of Arkansas seeking relief from child support payments and restoration of her one-half interest in the home in which her ex-husband and children resided. She was earning \$46,000 per year at the time the complaint was filed. The court placed great emphasis on the fact that the parties had entered into the support agreement privately and through the wife's attorney. Furthermore, the mother was earning substantially more than was her ex-husband. Despite the court's recognition that, in Arkansas, the general rule is that the father has the primary obligation for support of his children, *id.* at 848, it could find no change in circumstances sufficient to warrant granting the requested relief. The decision of the lower court was affirmed. *Accord, McFarlin v. Crawford*, 546 P.2d 855 (Idaho 1976). For a discussion of *Barnhard*, see 27 ARK. L. REV. 157 (1973).

46. *See* Hursh v. Hursh, 326 N.E.2d 95 (Ill. App. Ct. 1975); Spaulding v. Spaulding, 204 N.W.2d 634 (Iowa 1973); *In re Waymire*, 522 P.2d 1394 (Or. Ct. App. 1974); D'Ambrosio v. D'Ambrosio, 515 P.2d 1353 (Or. Ct. App. 1973); Garrett v. Garrett, 409 P.2d 470 (Wash. 1965); Woodward v. Woodward, 428 P.2d 389 (Wyo. 1967).

obligation is not new<sup>47</sup> but has recently gained even wider acceptance in up-dated support statutes.<sup>48</sup> The trend has been strengthened further by societal changes which increase the feasibility of charging women with such a duty.

The Uniform Marriage and Divorce Act refers to "either or both parents owing a duty of support" and lists factors to be considered by courts when determining respective support obligations. Among the factors listed are "the financial resources of the custodial parent" and "the financial resources and needs of the noncustodial parent."<sup>49</sup> The Act has been adopted in part by five states,<sup>50</sup> and two more have substantially similar provisions.<sup>51</sup> The Act should serve as a model for state statutory change and may also serve as a model for courts in interpreting present support statutes.

The well-being of children is in no way sacrificed by this abolition of the double standard in child support. In fact, the goal of the state in the imposition of the support duty<sup>52</sup> is furthered by holding two potential wage earners liable simultaneously for the same obligation and placing a reasonable burden on each. In addition, by acknowl-

47. See, e.g., *Finch v. Finch*, 22 Conn. 411 (1853); *Webb v. Daiger*, 173 A.2d 920 (D.C. 1961); *Purity Baking Co. v. Industrial Comm'n*, 166 N.E. 33 (Ill. 1929); *Stillmunkes v. Stillmunkes*, 65 N.W.2d 366 (Iowa 1954); *Hood v. Hood*, 113 A. 895 (Md. 1921); *Alvey v. Hartwig*, 67 A. 132 (Md. 1907); *Lowry v. Lowry*, 90 So. 2d 852 (Miss. 1956); *Cupit v. Brooks*, 79 So. 2d 478 (Miss. 1955); *Bruguier v. Bruguier*, 79 A.2d 497 (N.J. Super. Ct. Ch. Div. 1951).

48. See, e.g., ALASKA STAT. § 09.55.210 (1962); COLO. REV. STAT. § 14-10-115 (1973); CONN. GEN. STAT. ANN. § 46-57 (West 1978); D.C. CODE ENCYCL. § 16-916 (West Supp. 1977-78); ILL. REV. STAT. ch. 40, § 19 (1975); IOWA CODE ANN. § 598.21 (West Supp. 1978); LA. CIV. CODE ANN. art. 227 (West 1952); MONT. REV. CODES ANN. § 48-323 (Supp. 1977); N.H. REV. STAT. ANN. § 458:17 (Supp. 1975); N.J. STAT. ANN. § 2A: 34-23 (West Supp. 1977-78); N.M. STAT. ANN. §§ 22-7-6 to 15 (Supp. 1975); OR. REV. STAT. § 107.105(1) (1977); UTAH CODE ANN. § 30-3-5 (1953); VA. CODE § 20-107 (Supp. 1977); WASH. REV. CODE ANN. § 26.09.100 (Supp. 1977); WYO. STAT. § 20-2-113 (1977). For a detailed graphic breakdown of all state child support statutes, see WOMEN'S RIGHTS, *supra* note 3, at 147-55.

49. UNIFORM MARRIAGE AND DIVORCE ACT § 309.

In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) the financial resources of the child;
- (2) the financial resources of the custodial parent;
- (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) the physical and emotional condition of the child and his educational needs; and
- (5) the financial resources and needs of the noncustodial parent.

*Id.*

50. Arizona, Colorado, Illinois, Kentucky, and Montana. See 9 UNIFORM LAWS ANN. 360 (Supp. 1974-77).

51. GA. CODE ANN. §§ 74.101-.110 (1973) (although child support provision follows absolute liability on father and not Uniform Act); WASH. REV. CODE ANN. ch. 26.16 (Supp. 1976).

52. See notes 1-2 *supra* and accompanying text.

edging and assessing each parent's contribution, both monetary and nonmonetary, a more realistic and effective system of support can be established.<sup>53</sup>

However, when courts appear to embrace the concept of a presumptively equal obligation, the results are often inconsistent. Child support laws have evolved from a long tradition of woman's dependency on man.<sup>54</sup> As a result, the gender-based double standard remains as a basis for distinction.

One court appeared to break with this tradition, at least to the extent required by equity, some time ago. In 1933, the Supreme Court of Tennessee, in *Brooks v. Brooks*,<sup>55</sup> relying on a state statute imposing equal and joint liability on parents for support of their children,<sup>56</sup> determined that both parents were liable for past debts incurred in the necessary support of their children, to the extent of the parents' relative financial abilities.<sup>57</sup> Seven years later the same court reaffirmed its position: "[T]he obligation for the support of a minor child is no longer primarily charged upon the father, but father and mother are equally and jointly charged with the child's . . . support."<sup>58</sup>

Both these cases, however, were brought by custodial *mothers* seeking contribution from their ex-husbands. Thus, their value as precedent for the view that women should carry a burden equal to that carried by men is not as strong as it would be had they involved men seeking support payments from women. This became evident when, in 1970, a custodial father brought an action under the same statute seeking contribution for future child support from his ex-

53. See note 2 *supra*.

54. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .

. . . The paramount destiny and mission of woman are [sic] to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

*Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

55. 61 S.W.2d 654 (Tenn. 1933).

56. Ch. 41, § 1, 1923 Tenn. Pub. Acts 123 (current version at TENN. CODE ANN. § 34-101 (1977)).

57. The obligation of both to provide a support for their child is equal and joint, in so far as the child is concerned, but a controversy between the parents, as to the proper contribution of each, seems to us to be determinable only by equitable principles and rules, with due regard to the condition and means of each.

61 S.W.2d at 654.

58. *Rose Funeral Home, Inc. v. Julian*, 144 S.W.2d 755, 757 (Tenn. 1940).

wife, who was then gainfully employed.<sup>59</sup> The Tennessee Court of Appeals noted that none of the cases decided under the statute had dealt with an allowance for *future* support. The court further noted that no prior cases had involved a request by a father for contribution from the mother. On the basis of these distinctions, which appear insubstantial in light of the language of the two earlier cases, the court disallowed recovery, relying on a provision in the Tennessee divorce statute<sup>60</sup> which provided that in a divorce action "the court may decree that suitable support be made by the father."<sup>61</sup>

This variance between the child support duty as literally imposed by a state statute and the duty as actually enforced by the courts is not uncommon. Iowa's support law places equal responsibility on both parents for family expenses and the education of their children.<sup>62</sup> Upon examining cases decided under this law, however, Professor Homer Clark concluded that most child support orders in Iowa are still given against the father.<sup>63</sup>

In New Mexico the courts are authorized by statute to make allowance from the property of either parent for the support of the children.<sup>64</sup> Although that statute had been in force since 1953, the authors of a 1973 law review article were unable to find a single case in which "the wife was required to pay child support to the husband for children placed in his custody."<sup>65</sup>

The double standard again prevailed, despite a gender-neutral statute,<sup>66</sup> in *D'Ambrosio v. D'Ambrosio*.<sup>67</sup> There, the Oregon Court of Appeals actually acknowledged the neutrality of the state statute: "In Oregon the sex of a noncustodial parent is immaterial in determining his or her duty to contribute child support."<sup>68</sup>

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59. *Hilton v. Hilton*, 463 S.W.2d 955 (Tenn. Ct. App. 1970), *denial of cert. noted*, 463 S.W.2d 955 (Tenn. 1971).

60. TENN. CODE ANN. § 36-828 (1955) (current version at TENN. CODE ANN. § 36-828 (1977)).

61. 463 S.W.2d at 956. The statute has since been amended and now provides that "the court may decree that suitable support be made by the natural parents . . ." TENN. CODE ANN. § 36-828 (1977).

62. IOWA CODE ANN. § 597.14 (West 1950).

63. H. CLARK, *supra* note 4, at § 15.1, at 488-89 n.7. *But see* *Beasley v. Beasley*, 159 N.W.2d 449 (Iowa 1968), in which a mother was required to pay child support for the nine months of each year that the oldest child attended college.

64. N.M. STAT. ANN. § 22-7-15 (1953).

65. *Behles & Behles, Equal Rights in Divorce and Separation*, 3 N.M.L. REV. 118, 133 (1973). The authors concluded that "[f]or practical purposes the responsibility of paying child support is normally solely on the husband, whether he is given custody or not." *Id.* at 133-34.

66. OR. REV. STAT. § 107.105(1) (1977).

67. 515 P.2d 1353 (Or. Ct. App. 1973).

68. *Id.* at 1354 (emphasis added).

The father in *D'Ambrosio* had custody of the parties' three children. He appealed from a denial of his motion for an order requiring the mother to pay child support. The mother was employed and earning about \$600 per month.<sup>69</sup> She testified at trial that she did not wish to work permanently but merely wanted to pay some bills and intended to remarry.<sup>70</sup> The court based its denial of the father's motion on the lack of a sufficient change of circumstances to justify modification of the divorce decree.<sup>71</sup> At the same time, the court expressed doubt as to whether a noncustodial father earning \$600 per month would not be required by "any court . . . to pay some child support just because he was paying off debts . . . ."<sup>72</sup>

Thus, despite "the present trend in domestic relations law . . . to recognize the ever increasing equality of spouses,"<sup>73</sup> the law of child support is still a confusing and conflicting mixture of tradition, statutory law, and case law. Attempts are being made, though, to bring about true equality in shouldering the support obligation. Legislative reform must remain the primary goal. When statutes placing a disparate duty of support on the father disappear, courts will be less likely to rely on that method of enforcement. As the decisions indicate, however, legislative reform alone is not sufficient. To accomplish real and widespread change in the area of child support, courts as well as legislatures must reevaluate the use of gender as a basis of distinction in all areas of the law. This process has begun through interpretation of the Federal Constitution.

## II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Various statutes that discriminate on the basis of sex have been challenged through the equal protection clause of the fourteenth amendment to the United States Constitution.<sup>74</sup> This has proven to

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69. The father was earning approximately \$1,000 per month at the time the action was brought. *Id.*

70. The mother had terminated less lucrative employment as a sales clerk and had commenced working at a lumber mill. She also had had another child subsequent to the divorce and testified: "I just want to quit work and have a happy home when I got [*sic*] married." *Id.* The lower court commended her for not going on welfare and held that the father's income of \$1,000 per month was sufficient to support the three children in his custody. *Id.*

It is interesting to note that, despite the statute, the trial judge, in almost 18 years on the bench, had never been faced with a support request from a father. *Id.*

71. *Id.* at 1354-55.

72. *Id.* at 1354 (emphasis added).

73. Gabler, *The Impact of the ERA on Domestic Relations Law: Specific Focus on California*, 8 FAM. L.Q. 51, 56 (1974).

74. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." U.S. CONST. amend. XIV, § 1.

be a relatively successful means by which to attack such statutes,<sup>75</sup> but its use as an ultimate tool in the area of child support is uncertain.

The traditional test employed by the United States Supreme Court in equal protection challenges is the rational basis test.<sup>76</sup> Under this test, a classification or distinction made in a legislative enactment is presumptively constitutional.<sup>77</sup> The classification or distinction must be reasonable, not arbitrary, and must be rationally related to a valid public purpose.<sup>78</sup> If there is any reasonable justification for the legislative decision, it will be upheld.

Although continuing to employ the rational basis test in some cases, the Court has developed a second test for evaluating legislation affecting a fundamental interest<sup>79</sup> or classifying in an invidious manner.<sup>80</sup> Such laws are considered suspect, and, as such, they are subjected to strict scrutiny. The Court requires the demonstration of a compelling state interest in order for such laws to withstand an equal protection challenge. This requirement places a burden on the state or federal government which can rarely be met.<sup>81</sup> Thus, the "aggressive 'new' equal protection" applies "scrutiny that [is] 'strict' in theory and fatal in fact . . . ."<sup>82</sup>

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75. Advocates of the equal rights amendment, however, are generally pessimistic about the potential for obtaining true sexual equality through the equal protection clause:

In past years many proponents of equal rights for women believed that the goal could be achieved through judicial interpretation of the Equal Protection Clause . . . . An examination of the decisions of the Supreme Court demonstrates that there is no present likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality of rights for women. More important, equal protection doctrines, even in their most progressive form, are ultimately inadequate for that task.

Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 875 (1971) [hereinafter cited as Brown]. See also Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. C.R.-C.L. L. REV. 216, 218 (1971).

76. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

77. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19-20 (1972).

78. *Goesaert v. Cleary*, 335 U.S. 464 (1948). "One who assails the classification in such a law must carry the burden of showing it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

79. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

80. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin).

81. Note, *Equality for Men and Women, Three Approaches: Frontiero, The Equal Rights Amendment, and the Montana Equal Dignities Provision*, 35 MONT. L. REV. 325, 328 (1974) [hereinafter cited as *Three Approaches*].

82. Gunther, *supra* note 77, at 8.

Many of the classifications which have been deemed suspect are based on immutable characteristics.<sup>83</sup> Despite the fact that sex is such a characteristic, it was not termed suspect by the Warren Court, and it has not been so labeled by the Burger Court.<sup>84</sup> In fact, the Burger Court has not consistently employed the two-tiered, that is, rational basis versus strict scrutiny, approach of the Warren Court.<sup>85</sup> Rather, it has sought to develop a new, middle standard by which to deal with the great bulk of legislation challenged under the equal protection clause.<sup>86</sup> One commentator has described this newest standard as follows:

The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must *substantially further legislative ends*. . . .

. . . The yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not "constitutional" interests drawn from the value perceptions of the Justices.<sup>87</sup>

Under this "means-focused" equal protection analysis, the Court has avoided expansion of strict scrutiny while also avoiding the noninterventionist approach of the rational basis test.<sup>88</sup> What has appeared to evolve in many decisions has been termed by Professor Gunther as "minimum scrutiny with bite."<sup>89</sup> To understand the future of gender-based statutes under equal protection, including those imposing a double standard in the area of child support, an examination of some of these recent decisions is necessary.

In *Reed v. Reed*, an Idaho statute giving preference to men over similarly situated women as administrators of estates was unanimously declared unconstitutional.<sup>90</sup> The Court found the sex cri-

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83. See cases cited note 80 *supra*.

84. See *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). But see *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a four-justice plurality declared that sex was a suspect classification.

85. Gunther, *supra* note 77, at 17.

86. *Id.* at 20-21; see Johnston, *Sex Discrimination and The Supreme Court—1975*, 23 U.C.L.A. L. REV. 235 (1975); Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 166 [hereinafter cited as *Emerging Bifurcated Standard*]; Note, *Weinberger v. Wiesenfeld: Equal Protection and Sex Classifications in Government Benefit Programs*, 5 N.M.L. REV. 335 (1975) [hereinafter cited as *Benefit Programs*].

87. Gunther, *supra* note 77, at 20-21 (emphasis added).

88. *Id.* at 12, 18-20.

89. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 661 (9th ed. 1975).

terion "arbitrary"<sup>91</sup> and rejected the state's contention that the classification was reasonable because it reduced family disputes and avoided the need for administrative hearings:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.<sup>92</sup>

The Court purported to confine its analysis in *Reed* to the rational basis test.<sup>93</sup> Under that test as traditionally applied, however, the statute would probably have been upheld.<sup>94</sup> The actual test employed by the Court was a modified rational basis test,<sup>95</sup> neither subjecting the legislation to strict scrutiny nor deferring to a presumption of constitutionality.<sup>96</sup>

Two years later, in *Frontiero v. Richardson*, the Court denounced sex discrimination as " 'romantic paternalism.' "<sup>97</sup> The Court held statutes<sup>98</sup> unconstitutional which allowed male members of the armed forces<sup>99</sup> to claim wives as dependents without requiring investigation or proof of dependency while requiring servicewomen to prove claimed dependency of husbands.<sup>100</sup> The Court held that ad-

90. 404 U.S. 71 (1971).

91. *Id.* at 76.

92. *Id.* at 76-77.

93. "The question presented by this case, then, is whether difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective . . . ." *Id.* at 76.

94. See *Emerging Bifurcated Standard*, *supra* note 86, at 172-73.

95. Johnston, *Sex Discrimination and the Supreme Court—1971—1974*, 49 N.Y.U. L. REV. 617, 622 (1974).

96. One authority, in analyzing *Reed*, felt that the Court not only avoided strong reliance on either of the prior tests, but also avoided enunciating any new standard of review. See Gunther, *supra* note 77, at 34.

97. 411 U.S. 677, 684 (1973).

98. 10 U.S.C. § 1072 (1970); 37 U.S.C. § 401 (1970) (amended 1973).

99. The suit was brought against the federal government. Thus, *Frontiero* challenged the statutes under the due process clause of the fifth amendment because the fourteenth amendment runs only against the states. The fifth amendment due process clause has been held to encompass the concept of fourteenth amendment equal protection. *Hampton v. Wong*, 426 U.S. 88 (1976); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

100. Successful dependency claims resulted in the award of increased living quarter allowances and the receipt of medical and dental benefits for the spouse. The statutes created a rebuttable presumption against a husband's dependency on his wife. By analogy, if child support statutes were enacted with a rebuttable presumption in favor of a father's duty of support, they could perhaps be declared invalid under *Frontiero*.



ministrative convenience did not justify the gender-based classification.<sup>101</sup> Four justices concluded that changes in society required that classifications based on sex be considered suspect.<sup>102</sup> However, Justice Powell, in a concurring opinion joined by Justice Blackmun and Chief Justice Burger, cited the pendency of the equal rights amendment as reason for not declaring sex a suspect classification.<sup>103</sup>

In *Weinberger v. Wiesenfeld*,<sup>104</sup> the Court found a denial of equal protection in a provision of the Social Security Act<sup>105</sup> which made sex the sole determinant of whether the surviving spouse of a deceased wage earner received benefits while caring for a dependent child.<sup>106</sup> Justice Brennan, writing for the Court, found this provision indistinguishable from the statute in *Frontiero*.<sup>107</sup> Though it is unclear which test, if any, was employed,<sup>108</sup> the statute was described as an " 'archaic and overbroad' generalization,"<sup>109</sup> and the Court criticized the gender-based distinction drawn such, "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."<sup>110</sup>

The statute in *Wiesenfeld* had as its facial goal the protection of women and children.<sup>111</sup> The Court, however, did not confine its analysis to these protective aspects of the statute. The law denied equal

101. 411 U.S. at 688-91.

102. *Id.* at 686-87 (Brennan, J., joined by Douglas, Marshall, and White, JJ.). Justices Douglas and White, in subsequent cases, departed from the view that classifications based on sex are suspect—Justice Douglas in *Kahn v. Shevin*, 416 U.S. 351 (1974), and Justice White in *Geduldig v. Aiello*, 417 U.S. 484 (1974). Some commentators, however, are doubtful as to whether designation of sex as a suspect classification would be sufficient to render all statutes containing such a classification invalid.

The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered "suspect" and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by "compelling reasons," it would permit some classifications based on sex to survive.

Brown, *supra* note 75, at 880; see Dorsen & Ross, *supra* note 75, at 218.

103. 411 U.S. at 692.

104. 420 U.S. 636 (1975).

105. 42 U.S.C. § 402(g) (1970).

106. This case, like *Frontiero*, was brought under the fifth amendment due process clause. See note 99 *supra*.

107. 420 U.S. at 642-43.

108. See Johnston, *supra* note 86, at 256 (expressing the view that no test was articulated); *Benefit Programs*, *supra* note 86, at 339 (stating that *Wiesenfeld* holds that a "highly rational connection between legitimate legislative ends and statutory means will have to be shown in order for a sex-based classification to withstand an equal protection challenge" (emphasis added)).

109. 420 U.S. at 643 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

110. 420 U.S. at 643.

111. *Id.* at 646.

benefits to the survivors of women who had worked to support their families<sup>112</sup> and disregarded the plight of widowers left with young children by refusing them benefits in the same manner permitted similarly situated widows.<sup>113</sup>

The Court again examined a statute which discriminated on the basis of sex in *Stanton v. Stanton*.<sup>114</sup> The equal protection issue involved the constitutionality of a state statute which established eighteen as the age of majority for females and twenty-one as the age of majority for males.<sup>115</sup> The parties had executed a child support agreement pursuant to their divorce in 1960. The agreement did not specify the age at which the obligation ceased, and the father terminated payments for the daughter when she reached eighteen. The Utah Supreme Court, in upholding the statute under the rational basis test,<sup>116</sup> relied in part on what it referred to as "old notions" that "generally it is the man's primary responsibility to provide a home and its essentials"<sup>117</sup> and thereby recognized that the greater need for an education justified the gender-based distinction.<sup>118</sup>

The United States Supreme Court held, on the authority of *Reed*,<sup>119</sup> that the statute could not survive an equal protection attack "under any test—compelling state interest, or rational basis, or something in between . . ."<sup>120</sup> The Court noted societal changes which made the statute, within the context of child support,<sup>121</sup> unconstitutional: "Women's activities and responsibilities are increasing and expanding. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life where

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112. *Id.* at 645.

113. *Id.* at 650-52.

114. 421 U.S. 7 (1975).

115. UTAH CODE ANN. § 15-2-1 (1953). The statute has since been amended and now provides that 18 is the age of majority for both sexes. UTAH CODE ANN. § 15-2-1 (Supp. 1977).

116. "There is no doubt that the questioned statute treats men and women differently," but . . . people may be treated differently "so long as there is a reasonable basis for the classification, which is related to the purposes of the act, and it applies equally and uniformly to all persons within the class."

421 U.S. at 10 (quoting the Utah Supreme Court's decision, 517 P.2d 1010, 1012 (Utah 1974) (emphasis added)).

117. 517 P.2d 1010, 1012 (Utah 1974). The court's language regarding a man's primary responsibility is inconsistent with the spirit of Utah's statutory scheme, which charges both parents with the duty of child support. UTAH CODE ANN. § 78-45-3(4) (1953) (charges Father with support of wife and children); *id.* § 78-45-4 (charges mother with support of husband and children). Furthermore, the Utah Constitution contains an equal rights amendment. UTAH CONST. art. IV, § 1.

118. 517 P.2d at 1012.

119. 421 U.S. at 13.

120. *Id.* at 17.

121. *Id.*

education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice."<sup>122</sup>

Despite the Court's apparent willingness in these decisions to require a substantial justification for legislation creating a gender-based classification, two cases decided between *Frontiero* and *Wiesenfeld* raised doubt about equal protection as a basis for challenging statutes which did not discriminate against women but, in fact, were designed to protect them.

In *Kahn v. Shevin*,<sup>123</sup> Justice Douglas' opinion for the majority seemed to return to the "romantic paternalism" approach denounced in *Frontiero*. The case involved a Florida law which granted a property tax exemption to widows but not to widowers. The Court upheld the law on the ground that it compensated for the "overt discrimination" and the "socialization process of a male-dominated culture" to which women were historically subjected.<sup>124</sup> In two dissenting opinions, the three justices who, with Justice Douglas, found such a classification suspect in *Frontiero*, found the Florida tax law to be overinclusive by including all women and underinclusive by excluding all men.<sup>125</sup>

Similarly, in *Schlesinger v. Ballard*, a male naval officer challenged a rule under which women officers were given four years longer than men to achieve promotion or receive a mandatory discharge.<sup>126</sup> The majority held the classification reasonable in view of a woman's lesser opportunity to achieve promotion through combat and sea duty.<sup>127</sup> The dissenters, on the other hand, found no sufficient governmental interest served by the statutory classification.<sup>128</sup> They pointed out that the Court had "recently declined to manufacture justifications in order to save an apparently invalid statutory classification."<sup>129</sup>

In both *Kahn* and *Ballard*, the Court applied the rational basis test rather than the newer "means" scrutiny.<sup>130</sup> In *Kahn*, the Court

122. *Id.* at 15.

123. 416 U.S. 351 (1974).

124. *Id.* at 353.

125. *Id.* at 357-61.

126. 419 U.S. 498 (1975).

127. *Id.* at 508.

128. *Id.* at 517.

129. *Id.* at 520.

130. In *Kahn*, the Court, although citing *Reed*, stated that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines . . ." 416 U.S. at 355. Thus, the presumption of constitutionality embodied in the rational basis test was utilized. The Court went on to say that "[a] state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy.'" *Id.* (quoting *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959)).

stated that the statute was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."<sup>131</sup> The Court appeared to carve out an exception to the newer equal protection standard for statutes which purported to "alleviate the effects of past invidious discrimination."<sup>132</sup>

One court interpreted a gender-based child support statute as similar in purpose to the statute upheld in *Kahn*. In 1974, the Colorado Supreme Court, in *People v. Elliott*,<sup>133</sup> sustained a conviction under a statute which imposed criminal sanctions solely against the father for nonpayment of child support.<sup>134</sup> The court, applying the rational basis test, held that the statute did not violate the equal protection clause of the fourteenth amendment.<sup>135</sup> The statute's nonapplicability to mothers was justified on the ground that men's economic advantages placed them in a better position to fulfill the duty of child support. The court explained:

The proposition, that men generally are more economically favored and, therefore, better able to support their children, is not entirely an obsolete concept. In April of this year the United States Supreme Court gave judicial notice to this view in sustaining a five hundred dollar property tax exemption to widows but not to widowers, in *Kahn v. Shevin* . . . .<sup>136</sup>

The conclusion reached in *Elliott*, however, need not be predictive of the result of future equal protection challenges to the double standard in child support. At least one authority interpreted *Wiesenfeld*, decided six months after *Elliott*, as a retreat from the deference previously accorded female-protective statutes: "In *Weinberger v. Wiesenfeld* . . . the Court said it would not accept at face value, as an automatic shield for discrimination, recitation of woman-protective purposes for laws that associate women with the

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In *Ballard*, the Court merely looked to the rationality of Congress' belief underlying the statutory classification. 419 U.S. at 508-09.

131. 416 U.S. at 355.

132. *Emerging Bifurcated Standard*, *supra* note 86, at 181.

133. 525 P.2d 457 (Colo. 1974).

134. Ch. 124, § 1, 1955 Colo. Sess. Laws 287 (current version at COLO. REV. STAT. § 14-6-101 (1973)). The amended statute imposes a like obligation on both parents, but it was not applicable in *Elliott* because it took effect subsequent to the crime in question. Ch. 160, § 1, 1973 Colo. Sess. Laws 547 (codified at COLO. REV. STAT. § 14-6-101 (1973)).

135. 525 P.2d at 460. The court refused to declare sex a suspect classification and declared an intention to apply the "traditional equal protection test." *Id.* Despite the fact that the court quoted *Reed* as an example of the traditional test, a reading of the case indicates that the old rational basis test was applied in *Elliott*.

136. *Id.*

hearth, men with the wide world outside the home."<sup>137</sup>

Furthermore, the espoused purpose of gender-based support statutes is *not* the protection of women but rather the protection of children. Such statutes are based on the policy that the financial protection of children can best be assured by imposing the support duty on the source which was historically considered the most reasonable—the father.<sup>138</sup> Considering the increasing number of working mothers,<sup>139</sup> the imposition of absolute or primary liability on the father—rather than the imposition of a presumptively equal duty on both parents—is no longer rationally related to the protection of children. Recent equal protection decisions have recognized that the father is no longer the sole provider for the family.<sup>140</sup> Legislatures and courts which perpetuate a double standard in child support ignore this fact.

However, in another case, *People v. Olague*,<sup>141</sup> a California court rendered a decision similar to that in *Elliott*. In *Olague*, a father alleged that California's statute criminalizing nonsupport<sup>142</sup> invidiously discriminated by imposing sanctions primarily against fathers and only secondarily against mothers. He claimed a denial of equal protection in that the statute—by holding mothers liable as well—implied on its face that mothers were equally capable of supporting their children.<sup>143</sup> Even though California's civil support stat-

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137. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 41 (1975). This view may be overly optimistic, however. The statute in *Wiesenfeld* was also interpreted as discriminatory against women as well as men. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). Further, the Court stated in *Wiesenfeld* that, "[s]ince the gender-based classification . . . cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*." *Id.* at 653.

138. See notes 1-2 *supra* and accompanying text.

139. See notes 38-44 *supra* and accompanying text.

140. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. at 643.

141. 106 Cal. Rptr. 612 (App. Dep't Super. Ct. 1973).

142. Ch. 1587, § 1, 1971 Cal. Stats. 3202 (current version at CAL. PENAL CODE § 207 (West Supp. 1978)).

143. The statute provided in part:

A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

. . . .  
In the event that the father of either a legitimate or illegitimate minor child [fails to provide such support], the mother of said child shall become subject to the provisions of this section and be criminally liable for the support of said minor child during the period of failure on the part of the father to the same extent and in the same manner as the father.

*Id.* The statute has since been amended and is now gender-neutral. See note 155 *infra*.

ute imposed an equal duty on both parents,<sup>144</sup> and sex had been declared a suspect classification in that state,<sup>145</sup> the court reversed the trial court's ruling that the statute was unconstitutional.

The court concluded that the statute did not discriminate on the basis of sex, but that it merely differentiated "between *mothers* as a class and fathers as a class," and therefore was not subject to strict scrutiny.<sup>146</sup> Additionally, the purpose of the law was to "secure support of the child . . ."<sup>147</sup> Thus, the statute was "economic and social welfare legislation,"<sup>148</sup> which need bear only "a rational relationship to a conceivably legitimate state purpose,"<sup>149</sup> and was presumptively constitutional.<sup>150</sup> Despite the court's willingness to take judicial notice of changes in the stereotypical sex roles,<sup>151</sup> it held the economic differences still existing between the sexes sufficient to warrant the means employed by the statute.<sup>152</sup>

The *Olague* decision evidenced questionable reasoning in finding a lack of discrimination based on sex<sup>153</sup> and showed disregard for the standards set out in *Reed*: "The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."<sup>154</sup> Furthermore, cases such as *Wiesenfeld* may dispel the notion that economic and social welfare legislation warrants a presumption of constitutionality.<sup>155</sup>

Although the United States Supreme Court and most lower courts do not appear ready to treat sex as a suspect classification,<sup>156</sup> there

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144. CAL. CIV. CODE § 206 (West 1970).

145. *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971).

146. 106 Cal. Rptr. at 614 (emphasis in original).

147. *Id.* (quoting *People v. Sorensen*, 437 P.2d 495, 500 (Cal. 1968)).

148. *Id.* at 615.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 615-16.

153. See 14 SANTA CLARA LAW. 148, 152 (1973).

154. 404 U.S. at 75-76. The Court's dicta concerning the disparity in economic opportunities between the sexes notwithstanding, the statutory differentiation would seem to advance the purpose of support for the child very little if at all.

155. Prior to *Wiesenfeld*, the Supreme Court, despite a gender-based equal protection challenge, had employed a more lenient standard in examining social and welfare legislation in *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court upheld California's insurance program, which paid benefits for most but not all physical and mental disabilities but did not pay benefits for normal pregnancy and childbirth. See also *Gunther*, *supra* note 77, at 23.

It is important to note that the statute under which *Olague* was convicted has since been amended and now imposes a unified obligation on the "parent[s] of a minor child." See CAL. PENAL CODE § 207 (West Supp. 1978).

156. But see *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal.

is some justification for optimism regarding the use of the newest equal protection standard as a tool for elimination of the double standard in child support.<sup>157</sup> The Supreme Court is backing away from the deference once accorded legislative decisions. In fact, at the May 30, 1978, session, the Court granted review in *Orr v. Orr* to decide whether Alabama's alimony statute, which charges only men with the alimony obligation, violates the equal protection clause of the fourteenth amendment.<sup>158</sup> The Court appears increasingly ready to take judicial notice of factors such as the joint financial contribution of both parents in an increasing number of families—factors which make the imposition of a double standard in child support both illogical and self-defeating. This development is evident more from the results of cases such as *Reed*, *Frontiero*, and *Wiesenfeld* than from explicit expression by the Court. The language employed by the Court is often reminiscent of the "traditionally toothless minimal scrutiny standard" of equal protection.<sup>159</sup> The justices, however, seem willing to venture into unaccustomed areas<sup>160</sup> and to exercise less deference to legislative "experimentation."<sup>161</sup> The new-

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1971); *People v. Ellis*, 311 N.E.2d 98 (Ill. 1974).

157. However, dicta in *Stanton* may qualify such optimism. Although the Court held the gender-based distinction unconstitutional, it stated that "[i]t may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home . . . ." 421 U.S. at 14.

158. 46 U.S.L.W. 3733 (U.S. May 30, 1978) (No. 77-1119). The Alabama Supreme Court had quashed, as improvidently granted, a petition for certiorari to review a court of civil appeals decision upholding the statute. *Orr v. Orr*, 351 So. 2d 906 (Ala. 1977). Justice Richard L. Jones dissented from the decision to quash and found the statute unconstitutional even under the rational basis test. *Id.* at 906. Interestingly, because of a prior determination by the Alabama Supreme Court that the statute provides no alimony for males, Justice Jones felt that the statute could not now be interpreted otherwise:

Several Courts have read their alimony statutes so as to include males. . . . I cannot accept this reasoning, however. This Court has previously determined that our statute provides no alimony for male spouses. . . . Furthermore, because there was no alimony at common law, our statute must be strictly construed. The power to award alimony is jealously limited to statutory authority. . . . For this reason, I would hold the alimony statutes unconstitutional but I would not rewrite them so as to include the male spouse. We must look to the legislature to pass a more appropriate statute.

*Id.* at 909 (citations omitted). Prior interpretations need not so bind a court when the necessary result would be to preclude what Justice Jones himself found to be a warranted award of alimony to a "needy wife." *Id.* at 907. Statutes, like constitutions, must draw "meaning from the evolving standards . . . that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The ultimate resolution of *Orr* by the United States Supreme Court will probably be predictive of the manner in which the Court would resolve a challenge to a gender-based child support statute.

159. Gunther, *supra* note 77, at 18-19.

160. *Id.* at 30-33.

161. *Id.* at 20.

est equal protection standard requires "legislative purposes that have substantial basis in actuality, not merely in conjecture."<sup>162</sup>

Child support statutes which place an unequal burden on one parent do not have a substantial basis in reality. It is clearly conjecture for a legislature to make a factual determination, without benefit of in-court evidence of financial resources, as to which parent in a particular case is able to contribute to the support of the child.

The final determination, however, should not await an appeal to the United States Supreme Court. The courts that deal with child support on a regular basis are state courts. Change, therefore, can and should emanate from them. Some state constitutions contain equal protection clauses<sup>163</sup> or their equivalent<sup>164</sup> that can be employed instead of or in addition to the fourteenth amendment to the United States Constitution in challenging unequal support laws. Furthermore, as more legislators recognize the changing meaning of equal protection and reform existing child support statutes, courts should be less likely to ignore this mandate. Statutes and judicial decisions which perpetuate the double standard demonstrate a disregard of the need for long-overdue change.

### III. POTENTIAL EFFECTS OF THE EQUAL RIGHTS AMENDMENT

The equal rights amendment to the United States Constitution would be the most effective and expeditious means of abolishing the gender-based double standard in all areas of the law, including child support.<sup>165</sup> It has been suggested that the amendment would make

162. *Id.* at 21.

163. *E.g.*, HAWAII CONST. art. I, § 4; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; N.Y. CONST. art. I, § 11.

164. *E.g.*, ALASKA CONST. art. I, § 1; ARK. CONST. art. II, § 3; FLA. CONST. art. I, § 2; MO. CONST. art. I, § 2; N.J. CONST. art. I, § 5; N.C. CONST. art. I, § 1; UTAH CONST. art. I, §§ 7, 24.

165. See WOMEN'S RIGHTS, *supra* note 3, at 156. The proposed 27th amendment to the United States Constitution provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972) [hereinafter referred to as ERA].

At the end of 1975, 34 states had ratified the ERA. Ms., March 1976, at 94. In January, 1977, Indiana became the 35th state to ratify. Final ratification of the amendment requires ratification by three-fourths, or 38, of the states. U.S. CONST. art. V. Final ratification originally had to occur by March 22, 1979. Fasteau & Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?*, 1 HARV. WOMEN'S L.J. 27, 30 (1978) [hereinafter cited as *May a State Legislature Rescind*]. However, on August 15, 1978, the U.S. House of Representatives passed H.R.J. Res. 638, to extend the period allowed for



sex a prohibited basis of statutory classification.<sup>166</sup> It is more probable, however, that under the ERA state and federal governmental classifications based on sex<sup>167</sup> would not be prohibited per se but would become suspect.<sup>168</sup> Thus, they would be scrutinized in a fashion similar to those based on race.<sup>169</sup>

Proponents of the amendment claim that statutes affording benefits on the basis of sex would be held to apply to men and women equally,<sup>170</sup> and statutes which prohibit or limit conduct on the basis of sex would be invalidated.<sup>171</sup> In the specific area of child support, proponents claim that, rather than eliminating child support awards in favor of women, the amendment would allow for their continued use on a basis of "sexual equality [that] ensures that the parent who keeps the children will not be in worse financial position than the other parent."<sup>172</sup> Instead of apportioning child support on the basis of sex, courts could weigh more appropriate factors: the relative assets of each parent, the earnings and income capacities

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ratification to July 1, 1982. 95th Cong., 2d Sess., 124 CONG. REC. H8,665 (daily ed. Aug. 15, 1978). The Senate version of the ratification extension legislation, S.J. Res. 134, passed on October 6, 1978. 95th Cong., 2d Sess., 142 CONG. REC. S17,318 (daily ed. Oct. 6, 1978). There was some effort to include within the extension legislation a provision allowing states to rescind their earlier ratifications. See 124 CONG. REC. H8,639-58 (daily ed. Aug. 15, 1978). The effort failed. *Id.* at H6,658. This failure notwithstanding, three states—Idaho, Nebraska, and Tennessee—have voted to rescind their ratifications. *May a State Legislature Rescind, supra* at 30. There is doubt, however, that rescission is legally effective. Similar attempts at rescission were ignored by Congress when the fourteenth amendment was adopted.

New Jersey and Ohio [sought to withdraw ratification of] the Fourteenth Amendment, and New York ratified and then withdrew its ratification of the Fifteenth Amendment. Congress at that time evidently concluded that ratification, once accomplished, could not be undone. New Jersey and Ohio were counted to constitute the requisite three fourths for promulgation of the Fourteenth Amendment.

New York was counted among the states that ratified the Fifteenth Amendment. Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A.J. 1013, 1019 (1973).

166. Gabler, *supra* note 73, at 53; Note, *The Impact of the Equal Rights Amendment on the New York State Alimony Statute*, 24 BUFFALO L. REV. 395, 396 (1975); see Dybwad, *Implementing Washington's ERA: Problems with Wholesale Legislative Revision*, 49 WASH. L. REV. 571, 573-74 (1974).

167. See Ginsburg, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19, 21 (1978) [hereinafter cited as *The Way*].

168. *Three Approaches, supra* note 81, at 331. Another author expressed the view that "the ERA will foreclose the necessity for further attempts to have sex declared a 'suspect' classification, and will instead serve as a basis for legislative alteration of sex discrimination laws, a stimulus to equality between the sexes, and a foundation for change in legal structures and attitudes." *The Impact of the Equal Rights Amendment on the New York State Alimony Statute, supra* note 166, at 397.

169. See text accompanying notes 81-82 *supra*.

170. See Ginsburg, *supra* note 165, at 1017.

171. See *The Way, supra* note 167, at 21.

172. L. CALLOW, E.R.A., EQUAL RIGHTS OR ETERNAL RUINATION 4 (1975) (pamphlet published by the North West-Wayne, Michigan Chapter, NOW).

of each parent, and the time and care contribution of each parent.<sup>173</sup>

The most immediate impact of ERA would be the need for legislative reform of gender-based statutes.<sup>174</sup> One commentator has proposed a three-pronged test by which legislators could judge existing legislation to determine whether the ERA requires its change:<sup>175</sup>

"1) Does a particular law make a distinction between men and women? 2) Is the distinction permissible?<sup>176</sup> 3) If not, should the statute be invalidated or extended to apply to both sexes equally?"<sup>177</sup>

It is highly unlikely that a statute placing an unequal burden of child support on one parent could survive legislative (or judicial) analysis under such a test. The following is an example of the analysis which might be used and the change which would result.

The Michigan desertion and nonsupport statute presently in force penalizes only males:

Any man who deserts and abandons his wife or deserts and abandons his minor children under 17 years of age, without providing necessary and proper shelter, food, care and clothing for them and any man who being of sufficient ability shall fail, neglect or refuse to provide necessary and proper shelter, food, care and clothing for his wife or his minor children under the age of 17 years, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 3 years, nor less than 1 year, or by imprisonment in the county jail for not more than 1 year, and not less than 3 months . . .<sup>178</sup>

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173. Brown, *supra* note 75, at 946.

174. See K. DAVIDSON, R. GINSBERG, & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 115 (1974) (indicating that several studies have found that hundreds of state statutes contain gender-based references which will require legislative review under ERA). See also Ginsburg, *supra* note 165, at 1019.

175. Gabler, *supra* note 73, at 54.

176. The ERA does not require that women be treated in all respects the same as men. Equality does not mean "sameness." . . . [T]he ERA will not preclude legislation dealing with physical characteristics unique to one sex. Examples would include a law permitting maternal leave for childbearing for females, or a law regulating the donation of sperm for males only. Thus, the unique physical characteristics exception is limited to physical characteristics and does not extend to psychological, social or other characteristics. In contrast, if a particular characteristic is found among members of both sexes, then under the ERA it is not the sex factor but the individual factor which is determinative.

*Id.* at 53-54.

177. *Id.* at 55-56.

178. MICH. COMP. LAWS ANN. § 750.161 (1948). Interestingly, the former version of this statute employed the word "person" instead of "man." Pub. Act No. 328, § 161, 1931 Mich. Pub. Acts 624. The statute was amended in 1947 to its present form. Pub. Act No. 142, § 1, 1947 Mich. Pub. Acts 193.

Under the first question posed to the legislature in the three-pronged test, the statute explicitly does distinguish between men and women by its singular reference to men as subject to prosecution for nonsupport. Furthermore, an opinion of the Michigan attorney general clearly holds the statute applicable only to men.<sup>179</sup>

Under the second prong of the test, the distinction is clearly impermissible under the ERA. The state interest in enacting support legislation is the assurance of support for minor children.<sup>180</sup> A gender-based distinction between parents does not promote that interest under any standard of review—whether sex be a prohibited or merely a suspect classification.

The affirmative answers to the first two questions posed in the test would necessitate a legislative reevaluation under the third question. The result of this reevaluation undoubtedly would lead to a statutory amendment extending coverage of the statute to both parents. The substitution of the word "parent" where "man" presently appears and the addition of the words "or her" where "his" presently appears would accomplish this result.<sup>181</sup> The alternative—invalidation of the statute—would defeat the valid state interest in enacting a child support statute: to assure support for minor children by punishing nonsupport.

Regardless of the test employed, however, reform would be widespread if the ERA were ratified. Washington adopted an equal

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179. In [1945-46] MICH. OP. ATT'Y GEN. 0-4331, the attorney general advised that the statute did not apply to a woman who abandoned her children while her husband was away in the armed forces. However, prosecution was seen as possible under another, gender-neutral statute, MICH. COMP. LAWS ANN. § 750.136 (1948):

Any parent or guardian or person under whose protection any child may be, who cruelly or unlawfully punishes, or wilfully, unlawfully or negligently deprives of necessary food, clothing or shelter, or who wilfully abandons a child under 16 years of age, or who habitually causes or permits the health of such child to be injured, his or her life endangered by exposure, want or other injury to his or her person, or causes or permits him or her to engage in any occupation that will be likely to endanger his or her health, or deprave his or her morals or who habitually permits him or her to frequent public places for the purpose of begging or receiving alms, or to frequent the company of or consort with reputed thieves or prostitutes, or by vicious training depraves the morals of such child, shall, upon conviction, be deemed guilty of a felony . . . .

The existence of this statute would not, however, be sufficient to preclude a finding of unequal treatment between the sexes because it is not a nonsupport statute but a cruelty to children statute and therefore has a more limited scope of application.

180. Some statutes, like the Michigan one discussed, are designed to protect wives as well.

181. There should be no inference that "his" includes "her," for the Michigan Legislature has used both pronouns where it intended both sexes to be included. See MICH. COMP. LAWS ANN. § 750.136 (1948), *quoted in* note 179 *supra*. In addition, to fully comply with the ERA, this Michigan statute would have to be amended to substitute the word "spouse" where "wife" presently appears. See note 180 *supra*.

rights amendment to its constitution in 1972.<sup>182</sup> The statute implementing the amendment amended 120 separate sections of the Revised Code of Washington and repealed four others. Moreover:

By far the greatest number of the revised statutes touch upon the marital or family relationship . . . . These changes seek to equalize treatment of spouses by extending to the wife many rights formerly available only to the husband, as well as extending to husbands some benefits previously reserved only to wives. The wife is also now subject to several duties formerly imposed only on the husband.<sup>183</sup>

The purpose of the two-year delay built into the ERA<sup>184</sup> is to give state legislatures and Congress<sup>185</sup> sufficient time to conform laws to a standard of sexual equality.<sup>186</sup>

Providing for equal rights between the sexes in state constitutions is an alternative basis, though jurisdictionally more limited, upon which to equalize the child support duty.<sup>187</sup> Fifteen states currently have such constitutional provisions.<sup>188</sup> Not surprisingly, most of these states are presently among those whose statutes place an equal duty of support on both parents.<sup>189</sup> So the constitutional provisions, as they affect child support, have been subjected to only limited judicial interpretation. The few cases that have been reported, however, are both encouraging in their results and predictive of the potential interpretation of a federal ERA.

182. WASH. CONST. art. XXXI, discussed in Dybwad, *supra* note 166.

183. Dybwad, *supra* note 166, at 571.

184. See ERA § 3, quoted in note 165 *supra*.

185. See Ginsburg, *supra* note 165, at 1014. The author notes that, according to the solicitor general, a recent computer search revealed 876 sections of the United States Code with gender-based references.

186. S. REP. No. 689, 92d Cong., 2d Sess. 15 (1972); see Brown, *supra* note 75, at 909.

187. For an interesting discussion of a hypothetical court opinion calling for an equal duty in child support under Illinois' state equal rights amendment and a suggestion of a step-by-step rationale by which other courts could accomplish this (through declaration of sex as a suspect classification), see Note, *Child Support: His, Her, or Their Responsibility*, 25 DE PAUL L. REV. 707, 719-22 (1976).

188. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 4; ILL. CONST. art. I, § 18; MD. CONST. Declaration of Rights, art. 46; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. 2; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI; WYO. CONST. art. I, §§ 2-3; *id.* art. VI, § 1.

189. ALASKA STAT. § 09.55.210 (1962); COLO. REV. STAT. § 14-10-115 (1973); CONN. GEN. STAT. ANN. § 46-57 (West Supp. 1978); HAW. REV. STAT. § 580-47 (Supp. 1977); ILL. REV. STAT. ch. 40, § 19 (1975); MONT. REV. CODES ANN. § 43-323 (Supp. 1977); N.H. REV. STAT. ANN. § 458:17 (1968); N.M. STAT. ANN. §§ 22-7-6 to 15 (Supp. 1975); UTAH CODE ANN. § 30-3-5 (1953); VA. CODE § 20-107 (Supp. 1977); WASH. REV. CODE ANN. § 26.09.100 (Supp. 1977); WYO. STAT. ANN. § 20-2-113 (1977).

In 1974, in *People v. Elliott*,<sup>190</sup> the Colorado Supreme Court reversed a ruling that a statute imposing criminal sanctions for non-support solely on the father was violative of the Colorado Constitution's equal rights amendment.<sup>191</sup> The court reasoned that the criminal conduct in question occurred prior to the effective date of the amendment and that the amendment should be given only prospective application.<sup>192</sup> The court did not deny, however, that the amendment would invalidate such a statute if enforcement were sought after its effective date.

In another 1974 case, *Conway v. Dana*,<sup>193</sup> the Pennsylvania Supreme Court dealt directly with the constitutionality, under the state's equal rights amendment,<sup>194</sup> of the common law presumption that the child support obligation should rest on the father. Warren Dana petitioned for a reduction in a child support order on the grounds that his income had markedly declined and his former wife had obtained employment. The trial court denied his petition. The Superior Court affirmed. On appeal, the Pennsylvania Supreme Court held that the longstanding presumption of the father's primary liability for support, based solely on sex, was no longer valid because of the recently passed equal rights amendment to the state's constitution. Assuming that the trial court had adhered to that presumption and thus had disregarded the mother's income in denying the modification, the court reversed and ordered the modification.<sup>195</sup>

In dealing with the related area of child custody,<sup>196</sup> however, a Maryland court reached a contrary result,<sup>197</sup> holding that the preference for mothers in child custody cases survived the passage of that

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190. 525 P.2d 457 (Colo. 1974).

191. COLO. CONST. art. II, § 29. The statute upon which this prosecution was based was amended to impose equal susceptibility to prosecution for nonsupport on both parents. The father's criminal conduct, however, occurred prior to the amendment. See note 134 *supra*.

192. 525 P.2d at 458-59.

193. 318 A.2d 324 (Pa. 1974), discussed in 10 TULSA L.J. 485 (1975).

194. PA. CONST. art. I, § 27.

195. "Combining the decrease in the father's income along with the additional income resulting from the mother's recently acquired employment provides a sufficient change in circumstances to warrant a modification of the original order." 318 A.2d at 326-27.

196. Fathers are frequently victims of unwarranted presumptions about their childrearing ability. In a relatively recent decision, the Utah Supreme Court brushed aside a father's equal protection argument with the statement: "The contention [that a statutory presumption in favor of the mother violated equal protection] might have some merit to it in a proper case if the father was equally as gifted in lactation as is the mother." *Arends v. Arends*, 517 P.2d 1019, 1020 (Utah), cert. denied, 419 U.S. 881 (1974). The subject of this custody battle was a four-year-old child. See Conlin, *Equal Protection Versus Equal Rights Amendment—Where Are We Now?*, 24 DRAKE L. REV. 259, 289-92 (1975).

197. *Cooke v. Cooke*, 319 A.2d 841 (Md. Ct. Spec. App. 1974).

state's equal rights amendment.<sup>198</sup> Immediately after this decision, the legislature amended the custody statute to prohibit a preference based on sex in favor of either parent.<sup>199</sup> This legislative action removed from the discretion of the trial court the power to stereotype individuals on the basis of sex in deciding questions of child custody.

Expanded equality through state constitutional amendments would require the adoption of such provisions by many more states, an objective not presently sought by ERA advocates.<sup>200</sup> Final ratification of the federal ERA, therefore, is especially desirable. It not only would encourage legislative reform in *every* jurisdiction<sup>201</sup> without resort to the judicial process<sup>202</sup> but also, by making sex a suspect classification, would provide a more certain basis upon which to challenge statutes or judicial decisions which perpetuated a gender-based double standard.<sup>203</sup> Additionally, ratification would expedite a reevaluation of outmoded presumptions by society generally and by the judiciary specifically. Surely it would encourage—if not compel—fair decisions based on realistic evaluations of the capabilities of each parent.<sup>204</sup>

#### IV. CONCLUSION

Child support laws have been enacted in every state to protect minor children. Unfortunately, however, those laws generally have been enforced in an ineffective<sup>205</sup> and discriminatory manner. State

198. MD. CONST. Declaration of Rights, art. 46.

199. MD. ANN. CODE art. 72A, § 1 (Supp. 1977).

200. ERAmerica is the primary organization coordinating the fight for the ERA. In a discussion with Laura Callow, cochairwoman of Michigan ERAmerica, she stated that all efforts at this time are being put forth for ratification of the federal ERA rather than state amendments. For more information, contact ERAmerica, 1525 M Street, N.W., Ste. 605, Washington, D.C. 20036.

201. See sources cited note 166 *supra* and text accompanying note 166.

202. It is the legislatures that will play the key role in implementing ERA, while courts will play an important but secondary role. Gabler, *supra* note 73, at 55; see text accompanying notes 173, 177-86 *supra*.

203. See HOUSE COMM. ON THE JUDICIARY, MINORITY REPORT ON THE EQUAL RIGHTS AMENDMENT, H.R. REP. NO. 359, 92d Cong., 1st Sess. 5-8 (1971). See generally *Ex Parte Virginia*, 100 U.S. 339 (1880); I.C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 8:4, at 566 (1969) ("Action by state and local courts and judges will generally be state action . . .").

204. The ERA would not mean that a father could not be charged with the full financial burden of child support. Such a result could be fair and equitable if reached after an examination of the individual circumstances and without resort to gender-based presumptions. For a case in which it was held under a state equal rights amendment not to be an abuse of discretion to so charge a father, see *Schaab v. Schaab*, 531 P.2d 954 (N.M. 1974). See note 206 *infra*.

205. The following chart reflects the probability of a divorced mother's collecting child support payments.

courts and legislatures have perpetuated a double standard without examining its applicability to today's society. A disservice has been done both to the fathers, who bear a disproportionate and unrealistic financial burden, and to the mothers, who are neither credited with the ability to bear financial responsibilities nor challenged to take on such responsibilities.

Many men and women of today no longer fit into the mold of the past, a mold which shaped these laws. Present circumstances demand careful analysis of the financial capabilities of an individual without regard to gender-based assumptions. The most effective tool with which to force such analysis may be the increasing number of state statutes which impose the child support duty on both parents. As judges accept the literal meaning of these statutes and look to reality rather than sexual stereotypes, a fair apportionment of the support obligation can be accomplished.<sup>206</sup>

Beyond this, evolving notions of the meaning of equal rights and of constitutional equal protection provisions, both state and federal, provide tools by which inequality in child support statutes and judicial decisions may be challenged. Neither state legislators nor judges can long ignore the present constitutional interpretations of the rights of each person to stand before the law as an individual rather than merely as a member of a particular sex. The time for change is here. The means are available. The law as a dynamic and responsive tool of society must make such change a reality.

Years Since Court Order	Number of Open Cases	Full Compliance	Partial Compliance	No Compliance	Non-paying Fathers Against Whom Legal Action Was Taken
One	163	38%	20%	42%	19%
Two	163	28	20	52	32
Three	161	26	14	60	21
Four	161	22	11	67	18
Five	160	19	14	67	9
Six	158	17	12	71	6
Seven	157	17	12	71	4
Eight	155	17	8	75	2
Nine	155	17	8	75	0
Ten	149	13	8	79	1

Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 189-90 (1971) (reporting and commenting on material compiled by Kenneth Eckhardt in a 1955 study conducted in a metropolitan Wisconsin county, Eckhardt, *Deviance, Visibility, and Legal Action: The Duty to Support*, 15 Soc. PROB. 470 (1968)). See also note 3 *supra*.

206. A "fair apportionment" does not mean a rigidly enforced 50-50 contribution ratio. "Several state courts, considering ERA challenges to sex-based child support laws, already have ruled that mathematically equal contributions are not required by the ERA." WOMEN'S RIGHTS, *supra* note 3, at 156 (citing *Friedman v. Friedman*, 521 S.W.2d 111 (Tex. Ct. App. 1975); *Smith v. Smith*, 534 P.2d 1033 (Wash. Ct. App. 1975)).